

¹ 5. U.S.C. § 8101 *et seq.*

her claim for right shoulder strain, cervical strain and thoracic strain. Appellant lost intermittent time from work and received wage-loss compensation.

Appellant's attending physician, Dr. Ronald Malm, an osteopath and Board-certified family practitioner, initially diagnosed cervical and thoracic strain. He subsequently diagnosed thoracic spine pain, muscle spasm and somatic dysfunction of the thoracic region. Dr. Malm provided thoracic spine manipulations and recommended exercise.

In January 2005, the Office scheduled a second opinion examination with Dr. Alfred C. Lotman, a Board-certified orthopedic surgeon. In a February 17, 2005 report, Dr. Lotman noted the history of injury and treatment. He reviewed appellant's medical records and set forth his examination findings, noting that she displayed excessive pain and symptom magnification findings. Dr. Lotman stated that, while her current diagnosis was strain of the right shoulder and right thoracic region, there were no clinical objective examination findings supporting such a diagnosis. He noted minimal objective findings and advised that diagnostic test results were essentially normal. Dr. Lotman stated that, according to appellant's history and investigative findings, her symptomatology should have resolved within six months. He found no objective findings to support continued residuals related to her work injury and opined that no further treatment, therapies or assessment were appropriate.

On March 15, 2005 the Office proposed to terminate compensation benefits as the medical evidence showed that the accepted conditions had ceased without residuals.

Treatment notes from Dr. Malm continued to assess somatic dysfunction of the thoracic region, muscle spasm and thoracic spine pain. Therapy was provided on an as needed basis and appellant was to continue her independent exercise program.

By decision dated April 14, 2005, the Office terminated appellant's compensation benefits effective April 15, 2005.

On May 9, 2005 appellant requested a hearing. Additional treatment notes from Dr. Malm and requests for physical therapy and occupational therapy were received. By decision dated December 19, 2005, an Office hearing representative determined that the case was not in posture for a hearing. The hearing representative found that Dr. Malm's treatment notes supported that appellant had residuals of the work-related conditions as his reports documented muscle spasms in the T3 through T6 area and, thus, a conflict in medical opinion arose with Dr. Lotman, the second opinion physician, who opined that she had no residuals based on the lack of objective findings on examination. The Office hearing representative remanded the case for the Office to refer her to an impartial medical specialist.²

The Office referred appellant, together with an updated statement of accepted facts and the medical record, to Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon, for an impartial medical examination. In a January 26, 2006 report, Dr. Sabin reviewed the medical record, statement of accepted facts and diagnostic studies and noted his findings on examination. He

² The Office hearing representative found that compensation for wage loss was not an issue as there was no evidence appellant had filed a claim for wage loss and she was working.

noted that appellant's myofascial pain in the right shoulder and rhomboid area were based on subjective complaints of pain but there were no objective findings on examination. Dr. Sabin stated that, based on the medical evidence, it appeared her current condition by her history was work related as the medical evidence did not reveal that she had similar pain before her injury. Besides appellant's history and the consistency of her complaints in the medical evidence, there were no objective findings for her pain. Dr. Sabin stated that, because of the chronic nature of her pain, her prognosis for a full recovery was slim and, due to the subjective nature of her complaints, there was no way to anticipate when her symptoms would or could resolve. He opined that, since there were subjective complaints without correlative objective findings, there was no need for further treatment. Dr. Sabin further opined that it was not reasonable for appellant to continue with therapy indefinitely as there had been no sign that this provided any relief for or improvement in her pain. He opined that she was able to work eight hours a day with restrictions based on her subjective complaints.

Additional treatment notes from Dr. Malm were received.

By notice dated February 7, 2006, the Office advised appellant that it proposed to terminate her compensation benefits as the weight of the medical evidence established that the accepted conditions had ceased without residuals.

The Office received a March 7, 2006 statement from appellant, along with treatment notes from Dr. Malm dated January 6 and 27, 2006. Dr. Malm continued to diagnose somatic dysfunction of the thoracic region, thoracic spine pain and muscle spasm. He provided soft tissue manipulation and high velocity amplitude manipulation in the thoracic region.

By decision dated March 16, 2006, the Office terminated appellant's compensation benefits effective the same day. The decision was addressed to her at an address on Backskin Trail. On May 2, 2006 the Office received the March 16, 2006 decision from the postal service with a note that delivery was attempted but the person to whom it was addressed was not known.

In a May 7, 2007 statement, appellant opined that her back pain and spasms were work related and arose from the work injury. She also noted that her address was Buckskin Trail and requested the Office to correct its records. Additional statements from appellant concerned compensation for sick leave, annual leave and leave without pay.³

In reports dated May 7 and October 3, 2007, Dr. Malm advised that appellant continued to be treated for chronic thoracic spine pain and muscle spasm that she had since her fall at work. The ongoing treatment for appellant's chronic back pain included intermittent therapy on an as needed basis as well as a home exercise program. Dr. Malm stated that the treatment was necessary to keep her pain at a tolerable level so she could maintain appellant's current level of functioning. In several attending physician's reports from February 23, 2007 to February 1, 2008, he checked a box "yes" that her fall at work caused tenderness in thoracic region, muscle spasm and somatic dysfunction.

³ The record reflects appellant was filed claims for intermittent wage loss.

In a July 12, 2007 attending physician's report, Dr. W. Carlton Reckling, a Board-certified orthopedic surgeon, opined with a checkmark "yes" that appellant's right parascapular sprain/pain and thoracic pain were caused or aggravated by her fall at work. In his July 30, 2007 report, he noted that she was last seen in February 2001 and that she presented with complaints of thoracic spine pain she stated was the same as her work injury. Dr. Reckling provided an assessment of right parascapular strain/pain and thoracic paraspinal pain and opined that it was reasonable to have some massage and manipulation. He also prescribed a functional capacity evaluation. On October 9 and 10, 2007 appellant underwent a functional capacity evaluation. The summary report indicated that her appropriate physical demand level could not be objectively determined due to self-limiting activities.

The record includes attending physician's reports and treatment notes from Laura A. Gervais, a chiropractor, dated January 15, 2008 to March 11, 2009.

On November 4, 2008 the Office acknowledged that appellant did not receive its March 16, 2007 decision as it was returned as undeliverable. It advised her that another decision would issue.

In a May 1, 2009 decision, the Office terminated appellant's compensation benefits effective the same day. It found the medical documentation submitted since Dr. Sabin's referee examination was essentially repetitive and accorded determinative weight to his impartial medical opinion that all work-related residuals and disability had ceased.

On May 25, 2009 appellant requested a review of the written record. She submitted evidence previously of record, which included records from Dr. Reckling during the period November 22, 2000 to March 1, 2001; a May 1, 2001 work capacity evaluation from Dr. Bruce Lockwood, a Board-certified physiatrist, and a March 1, 2002 attending physician's report from Dr. Michael Kaplan, a Board-certified physiatrist. Additional reports from Dr. Gervais were also received.

In an April 8, 2009 report, Dr. G. Peter Perakos, a Board-certified internist, noted following appellant's medical condition for several years. He stated that it was a chronic relapsing condition which was very susceptible to stressors and, given appellant's current workload and work situation, she was experiencing an increase in her symptoms and sequelae of her medical condition. Dr. Perakos asked that her workload be reduced.

By decision dated September 15, 2009, the Office's hearing representative affirmed the May 1, 2009 decision.

LEGAL PRECEDENT

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁴ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate

⁴ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁶ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁷

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁸ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁹

ANALYSIS

The Office found that a conflict in medical opinion evidence arose between appellant's attending physician, Dr. Malm, and the Office referral physician, Dr. Lotman, as to whether appellant had any continuing residuals or disability causally related to her accepted conditions of right shoulder strain, cervical strain and thoracic strain and whether further treatment was necessary. Dr. Malm documented muscle spasm in the thoracic area and opined osteopathic treatment and an independent exercise program were necessary. Dr. Lotman opined that there were no objective findings to support continued residuals related to the work injury. The Office referred appellant to Dr. Sabin for an impartial medical examination. It relied on his opinion to find that she had no continuing residuals of her October 6, 2000 work injury.¹⁰

The Board finds that Dr. Sabin's referee opinion does not clearly resolve the issue of whether appellant has residuals of her October 6, 2000 work injury. Dr. Sabin noted that her current condition of chronic pain was work related due to her medical history and the consistency of her complaints in the medical evidence. However, he also stated that, since there were no objective findings for appellant's pain, there was no need for further treatment. Dr. Sabin did not explain this apparent inconsistency. His opinion is equivocal and unrationalized on the issue of whether appellant still has residuals of the accepted right shoulder strain, cervical strain or thoracic strain and whether further treatment or therapy are warranted.

⁵ *Id.*

⁶ *Roger G. Payne*, 55 ECAB 535 (2004).

⁷ *Pamela K. Guesford*, 53 ECAB 726 (2002).

⁸ 5 U.S.C. § 8123(a).

⁹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁰ The Board notes that entitlement to wage-loss compensation benefits is not an issue as appellant was not in receipt of wage-loss compensation.

Dr. Sabin's opinion is not dispositive on the compensation issue presented and is not entitled to special weight.

The Board notes that Dr. Sabin's January 26, 2006 report was over three years old at the time the Office terminated benefits on May 1, 2009. The Board has considered the age of a medical evaluation as a factor to be considered when the Office modifies benefits.¹¹ The Office did not attempt to obtain a current report from Dr. Sabin or one which clarified the apparent discrepancy in his January 26, 2006 report before terminating benefits.¹² As Dr. Sabin's report is insufficient to resolve the conflict in the medical evidence, the Office did not meet its burden of proof to terminate appellant's medical compensation benefits.

CONCLUSION

The Board finds that the Office has not met its burden of proof to terminate appellant's medical compensation benefits effective May 1, 2009.

¹¹ See e.g., *Keith Hanselman*, 42 ECAB 680 (1991) (a report almost two years old was deemed an invalid basis for a disability determination or loss of wage-earning capacity decision); *Anthony Pestana*, 39 ECAB 980 (1988) (a three-year-old medical report was not reasonably current for purposes of a wage-earning capacity determination). See also *Ellen G. Trimmer*, 32 ECAB 1878 (1981) (the passage of time lessens the relevance of work tolerance limitations).

¹² *I.H.*, Docket No. 08-1352 (issued December 24, 2008) (when the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated September 15, 2009 is reversed.

Issued: April 22, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board